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No. 139

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

WILMINGTON STAR MINING COMPANY, *Plaintiff in Error,* *vs.* **MINNIE FULTON,** *Defendant in Error.*	In Error to the Circuit Court of the United States for the Northern District of Illinois.

MOTION TO DISMISS APPEAL AND AFFIRM JUDGMENT.

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MOTION TO DISMISS APPEAL AND AFFIRM JUDGMENT.

MAY IT PLEASE THE COURT:

We respectfully present for the consideration of the court in this case the following motion:

Now comes Minnie Fulton, defendant in error in the above entitled cause, by Arthur J. Eddy, her attorney, and moves the court to dismiss the writ of error herein and to affirm the judgment of the Circuit Court rendered herein.

STATEMENT OF PROPOSITION.

The constitutional point raised by counsel for plaintiff in error, upon which the right of appeal to this court is based is this: that the Miners Law of Illinois (Chap. 93, Rev. Stat. of Illinois)—under which this action is brought—is in contravention of that portion of the Fourteenth Amendment of the Constitution of the United States, to the effect that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction equal protection of the laws.

The complaint made by plaintiff in error is, that the act compels mine owners to employ in their mines a mine manager, hoisting engineer and a mine examiner, who are required by law to pass an examination and procure a certificate before being qualified to take such positions, and also requires that these employes shall perform certain specified and enumerated duties, and further provides that a right of action shall accrue to any one suffering injury to person or property, or to the widow and those dependent upon any person who may be killed by reason of a willful violation of the provisions of the said Act.

Plaintiff in error contends that the choice of the employer is thus restricted to a certain class of men, and the control of the aforesaid employes is partially taken from the employer by reason of the statutory duties imposed on them, and that to hold the employer

liable for a violation of the statute by such servants is unconstitutional and therefore it is contended that the act, in so far as it attempts to create such liability, is void.

Our answer to that contention—for the purpose of this motion—is this: the declaration consists of eight counts under various sections of the act, and the first count is based upon Section 19 of the statute *which imposes duties directly and personally upon the mine owner, distinct and separate from the duties required of the servants heretofore referred to;* and even if all the other counts of the declaration were subject to the objection raised by counsel (which we do not by any means admit) this count is obviously not obnoxious to the constitution, even under the theory of plaintiff in error. The verdict in this case is general, and this first count is sufficient to sustain the action, therefore we say the constitutional point attempted to be injected into this case *is not a substantial or essential point in the case,* but on the contrary is entirely academic, and as we understand the law, this appeal should be dismissed.

SUGGESTIONS IN SUPPORT OF MOTION.

We feel impelled to present our motion in this case and the reasons for presenting the same to the court quite fully, because it will be impossible for counsel for defendant in error to appear in person before the court to argue the matter orally. Our client is absolutely without means, even to pay the expenses of counsel to Washington, and therefore we must rely entirely upon the motion and suggestions in support thereof, as herein presented.

The case at bar was tried twice in the Circuit Court and at the close of plaintiff's evidence on the first trial, the jury was instructed to find for the defendant. On appeal to the Circuit Court of Appeals for the Seventh Circuit, the case was reversed and remanded, and the opinion of the court disposes of all the substantial points in the case, including the constitutionality of the Illinois Act involved. The opinion of the Circuit Court of Appeals is found in the 133rd Federal Reporter, 193, and on page 197 the court says:

"Because the selection of a mine manager is thus restricted to a class of men who have passed an examination—cutting off from employment by the proprietor, the whole body of the population who otherwise would be eligible—it is urged upon us, either that the legislature meant to exempt the employer from liability for the defaults of such mine manager, *or that the act, to the extent that it compels a selection from such class, at the same time holding the owner liable for defaults arising therefrom, is unconstitutional;* and in this connection *Durkin* v. *Kingston Coal Co.*, 171 Pa., 193; 33 Atl., 237; 29 L. R. A., 808; 50 Am. St. Rep., 801; *Homer Ramsdell Company* v. *La Campagnie Gen-*

erale Trans-Atlantique, 182 U. S., 406; 21 Sup. Ct., 831; 45 L. Ed., 1155; *Crisp* v. *The United States, etc., Co.* (D. C.), 124 Fed., 748, and other cases, are cited. Some of these cases were under the pilotage laws, requiring that a ship nearing port should take on the first pilot who hailed the vessel, or be liable for full compensation for such pilot. The ship master's choice was thus limited, *not to a class but to an individual.* This difference creates a substantial distinction between those cases and the case under consideration.

The Pennsylvania cases we are unwilling to follow. The authority of Illinois is against them. *Consolidated Coal Company of St. Louis* v. *Frank Seniger,* 179 Ill., 370, 53 N. E., 733; *Riverton Coal Company* v. *John E. Shepherd,* 207 Ill., 395, 69 N. E., 921, as also the substantial considerations underlying the act. The Illinois act was passed under *a mandate of the constitution of Illinois of* 1870 (Article 4, Sec. 29) making it the duty of the legislature to pass laws for the protection of operative miners. It grew out of the public's wish that every precaution should be taken against the unusual hazards and dangers incident to the inhabitancy of mines. It was intended, *and intended rightly,* to protect with all known expedients, every person whose occupation required him to labor in these subterranean rooms and roadways.

The requirements imposed upon the owner are not unnecessarily numerous, strict, or otherwise burdensome. If it be not unreasonable, as certainly it is not, that mine inspectors, mine examiners, and mine managers be competent men, it is equally not unreasonable that they be able to prove by examinations as provided for, the possession of such competency. The restriction on the owner limits him, it is true, to selection from a class; but in practice, if the law be faithfully carried out, the class will include all the available men competent; so that, *in its practical outcome, the act of* 1899 *simply requires that the owner's mine manager shall be a competent man,* his competency to be determined according to standards fixed by the state authority; *and within this area of proven competency—*

and the spirit of the common law gave no larger area—the owner is at liberty to employ and discharge as he chooses."

We respectfully request the court to read the entire opinion of the Circuit Court of Appeals as it throws much light on all the points involved in this controversy.

If the court will refer to Chapt. 93, Rev. Statutes of Ill., entitled "Mines and Miners," it will be observed that Section 6A provides in substance for the appointment of a board of examiners to be known as the State Mining Board, whose duty it shall be to make formal inquiry into and pass upon the practical and technical qualifications and personal fitness of men seeking certificates of competency as mine managers, hoisting engineers and mine examiners.

Paragraphs D and F of Sec. 7 set forth the qualifications which applicants for the position of mine manager and mine examiner must possess and sets forth substantially the nature of the examination which they must pass before receiving certificates of competency.

Paragraphs E and G of Sec. 8 make it unlawful to employ any person as mine manager or examiner who does not hold a certificate of competency issued by the State Mining Board.

Section 16 of the Act is entitled "Duties of Mine Manager and Miners" and specifies certain duties required to be performed by the mine manager, and Section 18 is entitled "Duties of Mine Examiners" and specifies the duties imposed upon the mine examiner.

Section 19 of the Act is entitled "Ventilation" and reads in part as follows:

"Throughout every coal mine there shall be maintained currents of fresh air sufficient for the health and safety of all men and animals employed therein and such ventilation shall be produced by a fan, or some other artificial means.

(A) The quantity of air required to be kept in circulation and passing a given point shall be not less than 100 cubic feet per minute for each person, and not less than 600 cubic feet per minute for each animal in the mine, measured at the foot of the downcast, and this quantity may be increased at the discretion of the inspector whenever, in his judgment, unusual conditions make a stronger current necessary. Said currents shall be forced into every working place throughout the mine, so that all parts of the same shall be reasonably free from standing powder-smoke and deleterious air of every kind.

(B) The measurement of the currents of air shall be taken with an anemometer at the foot of the downcast, at the foot of the upcast, and at the working face of each division or split of the air-current. And a record of such measurements shall be made and preserved in the office, as elsewhere provided in this act.

(C) The main current of air shall be so split or subdivided as to give a separate current of reasonably pure air to every 100 men at work, and the inspector shall have authority to order separate currents for smaller groups of men, if in his judgment special conditions make it necessary.

(G) Cross-cuts shall be made not more than sixty feet apart, and no room shall be opened in advance of the air current.

(H) When it becomes necessary to close cross-cuts, connecting the inlet and outlet air-courses in mines generating dangerous gases, the stoppings shall be built in a substantial manner with brick or other suitable building material laid in mortar or cement, if practicable, but in no case shall they be built of lumber, except for temporary purposes."

The last paragraph of Sec. 33 of the Act reads as follows:

"For any injury to person or property, occasioned by any willful violations of this act, or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby; and in case of loss of life by reason of such willful violation or willful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives not to exceed the sum of five thousand dollars."

The first count of the declaration herein is based upon the first paragraph of Section 19, and alleges a willful failure "to maintain in said coal mine currents of fresh air sufficient for the health and safety of said Samuel Fulton contrary to the form of the statute in such case made and provided by means and in consequence of which willful failure on the part of the said defendant to so maintain in said coal mine such currents of fresh air, as aforesaid, a large quantity of dangerous gas was suffered and permitted by the said defendant to accumulate, be and remain through and in the place in said coal mine where the said Samuel Fulton was then engaged at work in the line of his employment." (Rec., 4-5.)

The second and third counts are based upon a failure to construct cross-cuts in the mine, and to maintain stoppings along the airways. (Rec., 5-6.) These duties are required to be performed by the mine manager by Section 16, Paragraph B, and the same duties are also directly imposed upon the mine owner by Section 19, Paragraphs G and H, but as the first count of the

declaration is based upon a paragraph of the act which is so clearly distinct and separate from those portions of the law imposing duties upon the employes, that for the purpose of this motion we rely upon that count.

The law of Illinois is very explicit upon the point that one good count in a declaration will be sufficient to sustain the action under a general verdict.

Section 57 of the Illinois Practice Act, Chapt. 110, Ill. Rev. Stat., reads as follows:

"Whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count if one or more of the counts in the declaration be sufficient to sustain the verdict."

In the case of *City of Chicago* v. *Longergan,* 196 Illinois, pages 518, 520, the Supreme Court of the state held:

"When an entire verdict is given on several counts it will not be set aside or reversed because of any defective count if one or more of the counts be sufficient to sustain the verdict."

In the case of *Consolidated Coal Company* v. *Scheiber,* 167 Ill., 539, 543, the court held:

"The rule at common law was that although there were good counts in the declaration, yet if there were one bad count the judgment would be arrested, but that rule applied only where such bad count was insufficient to support the judgment and not where it would have been held merely defective in stating the cause of action. Our statute has so far changed the rule that where there is an entire verdict on several counts it shall not be set aside or reversed because the declaration contains a defective count if there be one or more counts sufficient to sustain the verdict."

In the case of *C. & A. R. R. Co.* v. *Anderson,* 166 Ill., 572, 575, the court said:

"If there is one good count to which the evidence was applicable and which is sufficient to sustain the judgment the error of the court, if any, in refusal to instruct the jury to disregard the other counts becomes harmless."

By Sec. 914 of the United States Compiled Statutes, title, "The Judiciary," it is provided:

"The practice, pleadings and forms and modes of procedure in civil cases other than equity and admiralty causes in the Circuit and District Courts shall conform as near as may to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding."

We assume that this court will hold as conclusive the rule of practice established by the statute of Illinois and the decisions of the Supreme Court of the state, and therefore if this first count of the declaration does not fall within the objections raised by plaintiff in error, we believe this court will refuse to take jurisdiction of the case.

It is the established and universal rule of this court that it will not take jurisdiction of a case unless the constitutional point involved in the controversy is a real and substantial point upon the determination of which the result of the suit depends. In the case of *Western Union Telegraph Co.* v. *Ann Arbor Railroad Co.*, 178 U. S., 239, 243, 244, this court said, by Judge Fuller:

"When a suit does not *really and substantially* involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States upon the determination of which the result depends, *it is not a suit arising under the constitution or*

laws. And it must appear on the record by a statement in legal and logical form such as is required in good pleading that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground" (citing *Gold Washing & Water Co.* v. *Keyes,* 96 U. S., 199; *Blackburn* v. *Portland Gold Mining Co.,* 175 U. S., 571).

In the case of *Lampasas* v. *Bell,* 180 U. S., 276, 282, this court said:

"This court has only jurisdiction by appeal or writ of error directly from the Circuit Court in certain cases one of which is, 'When the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.' Section 5 of the Judiciary Act of March 3, 1891, C. 517, 26 Stat., 826, 828. *But the claim must be real and substantial. A mere claim in words is not enough.*" The court then quotes with approval the language above quoted from the *Western Union Telegraph Co.* v. *Ann Arbor Railroad Company.* To the same effect is *Shreveport* v. *Cole,* 129 U. S., 36, 41.

Gibbs v. *Crandall,* 120 U. S., 105, 108.
Atarin v. *New York,* 115 U. S., 248, 257.
New Orleans v. *Benjamin,* 153 U. S., 411, 424.
Gold Washing & Water Co. v. *Keys,* 96 U. S., 199, 203, 204

(See also Sec. 5, Chapt. 7, U. S. Compiled Stat., title "The Judiciary.")

Our contention is that even if the court should find that the sections of the Illinois Miners Act, under which certain counts of the declaration are brought, are unconstitutional (which we do not concede), still if Section 19 of the act, which simply requires the mine owner

to properly ventilate his mine, is not obnoxious to the constitution and it appearing to the court upon the face of the record herein that the first count of the declaration is based upon that section of the statute and that the verdict of the jury herein is a general verdict which under the law may be sustained upon one good count of the declaration, then we say that the contention of plaintiff in error must entirely fail and that there is not involved in this suit a substantial or real constitutional point upon which the determination of this case in any wise depends. Even if the court should be inclined to hold that certain portions of the act were unconstitutional, that would not necessarily invalidate the entire law, and unless Section 19 was included in the portions held to be unconstitutional the verdict and judgment in this case would stand as valid.

In the case of *Loeb* v. *Columbia Township Trustees,* 179 U. S., 472, 490, this court held:

"As one section of a statute may be repugnant to the constitution without rendering the whole act void, so one provision of a section may be invalid by reason of its not conforming to the constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand while another will fall unless the two are so connected or dependent on each other in subject matter, meaning or purpose that the good cannot remain without the bad."

To the same effect substantially is the case of *Diamond Glue Company* v. *United States Glue Company,* 187 U. S., 611, 617.

This court we believe will upon its own motion refuse to take jurisdiction of a case where it appears that the judicial power of the court does not extend even if not moved to do so, by either party to the controversy. (See *M. C. L. M. Ry. Co.* v. *Swan,* 111 U. S., 379, 384.)

The sufficiency of every count in the declaration was fully passed upon by the trial court in disposing of the demurrers which were filed to each and all of the counts and again during the trial of the case, on motion to direct a verdict for defendant and later on the motion for a new trial and, therefore, for the purpose of determining the question presented by this motion, we assume that it will not be necessary for this court to pass upon the merits of the various counts of the declaration *as applied to the issues in the case,* but it will only be necessary for the court to examine the record sufficiently to determine whether or not the first count of the declaration, as we claim, is based upon a section of the Miners Act which is not repugnant to the Constitution of the United States.

If the court determines that the first count of the declaration is based upon Section 19 of the statute, and that such section is not obnoxious to the Constitution, then the claim of plaintiff in error that a constitutional question arises in this case necessary to the determination thereof, must fail, and we therefore respectfully submit, that our motion to dismiss the appeal and affirm the judgment of the Circuit Court should be granted, and we pray the court to enter an order so disposing of the case.

Respectfully submitted,

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